

# EXHIBIT 56

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF VIRGINIA  
3

4 BMG RIGHTS MANAGEMENT : NO. 1:14-cv-1611  
5 (US) LLC, and ROUND : (LOG/JFA)  
6 HILL MUSIC LP :  
7 Plaintiffs :  
8 vs. :  
9 COX ENTERPRISES, :  
10 INC., COX :  
11 COMMUNICATIONS, INC., :  
12 COXCOM, LLC :  
13 Defendants  
14  
15

16 Videotaped deposition of TERRENCE  
17 MCGARTY, PH.D., taken at the law offices of  
18 Steptoe & Johnson, 1330 Connecticut Avenue NW,  
19 Washington, DC, commencing at 9:28 a.m. before  
20 Ryan K. Black, Registered Professional Reporter,  
21 Certified Livenote Reporter and Notary Public,  
22 Friday, August 7, 2015.  
23  
24

25 PAGES 1 - 200

Page 1

1 APPEARANCES:

2

3 STEPTOE & JOHNSON LLP

4 By: WILLIAM G. PECAU, ESQ.

5 1330 Connecticut Avenue NW

6 Washington, DC 20036

7 202.439.3000

8 wpecau@steptoe.com

9 Representing the Plaintiffs

10

11 FENWICK & WEST LLP

12 By: ARMEN N. NERCESSIAN, ESQ.

13 DAVID L. HAYES, ESQ.

14 555 California Street

15 12th Floor

16 San Francisco, CA 94104

17 415.875.2388

18 anercessian@fenwick.com

19 dhayes@fenwick.com

20 Representing the Defendants

21

22 ALSO PRESENT:

23 Miko Goodhill, Video Specialist

24 Bill Rosenblatt - Giant Steps

25 Eric Dunn, Fenwick Summer Associate

Page 2

1 THE VIDEOGRAPHER: We are now on  
2 record. Please note that the microphones are  
3 sensitive and may pick up whispering and private  
4 conversations. Please turn off all cell phones  
5 or place them away from the microphones, as  
6 they can interfere with the deposition audio.  
7 Recording will continue until all parties agree  
8 to go off record.

9 My name is Miko Goodhill, representing  
10 Veritext. The date today is Friday, August 7th,  
11 2015, and the time is approximately 9:28 a.m.

12 This deposition is being held at  
13 Steptoe & Johnson, located at 1330 Connecticut  
14 Avenue Northwest, Washington, D.C. 20036, and is  
15 being taken by counsel for the defense.

16 The caption of the case is BMG  
17 Rights Management, Incorporated, versus Cox  
18 Enterprises.

19 This case is filed in the United  
20 States District Court for the Eastern District  
21 of Virginia, Case Number 1:14-cv-1611 (LOG/JFA).

22 The name of the witness today is  
23 Terrence McGarty.

24 At this time the attorneys present in  
25 the room and/or attending remotely will identify

1 themselves and the parties that they represent.

2 MR. NERCESSIAN: This is Armen  
3 Nercessian, of Fenwick & West, representing the  
4 defendants. With me are my colleague, David  
5 Hayes, and our summer associate, Eric Dunn.

6 Also attending is Bill Rosenblatt.

7 THE VIDEOGRAPHER: Okay.

8 MR. PECAU: Will Pecau. I'm with  
9 the firm of Steptoe & Johnson, representing the  
10 plaintiffs, BMG and Round Hill.

11 THE VIDEOGRAPHER: Our court reporter,  
12 Mr. Ryan Black, representing Veritext, will  
13 swear in the witness and we can proceed.

14 \* \* \*

15 Whereupon --

16 TERRENCE MCGARTY, PH.D.,  
17 called to testify, having been first duly sworn  
18 or affirmed, was examined and testified as  
19 follows:

20 EXAMINATION

21 BY MR. NERCESSIAN:

22 Q. Good morning, Mr. McGarty.

23 A. Good morning.

24 Q. In a moment, I'm going to hand you  
25 the reports you submitted in connection with

Page 7

1 MR. PECAU: Objection. It's vague.

2 THE WITNESS: As a matter of course of  
3 its provision of services to those customers?

4 BY MR. NERCESSIAN:

5 Q. I'm asking for your opinion of  
6 whether it would be proper to detect whether a  
7 particular customer goes to the Google site on a  
8 particular day.

9 MR. PECAU: Again, I object.

10 THE WITNESS: To some degree, this  
11 starts to walk onto the internet neutrality  
12 space, and I've opined on that extensively, all  
13 right? And the FCC's approach is that ISPs can  
14 do things appropriate for network management,  
15 but not getting themselves into the sticky  
16 wicket of what a customer is actually doing.

17 So I've gone on the record of  
18 saying that both inbound and outbound network  
19 management is appropriate, but deciding who goes  
20 where at what and when is less than appropriate.

21 BY MR. NERCESSIAN:

22 Q. And does that network management that  
23 you opine is appropriate allow Cox to control  
24 subscriber activity?

25 MR. PECAU: Objection; vague.

1 THE WITNESS: As I've said on prior  
2 occasions, Cox has the ultimate control. They  
3 could turn the switch off. So when I use the  
4 term control, I mean they can either allow the  
5 customer to continue doing X or stop it, period.  
6 BY MR. NERCESSIAN;

7 Q. Short of disabling access, can Cox  
8 control any computer using a subscriber's  
9 network?

10 A. Not to my knowledge --

11 MR. PECAU: I object.

12 THE WITNESS: Sorry.

13 MR. PECAU: I object to the question.

14 You can answer.

15 THE WITNESS: Not to my knowledge.

16 BY MR. NERCESSIAN:

17 Q. Short of disabling internet access,  
18 can Cox control what an individual user of a  
19 subscriber's network downloads from the  
20 internet?

21 A. Can -- let me see if I can understand  
22 the question.

23 Can Cox actively intercept what  
24 a customer is receiving from the internet,  
25 ascertain what it is and then intervene and

1 prevent that customer from receiving that  
2 information?

3 Q. If that's how you understand it,  
4 but my -- my question was, short of disabling  
5 internet access, can Cox control what any  
6 individual user of a subscriber's network  
7 downloads from the internet?

8 A. The can control is a difficult  
9 question to answer, because, you know, the NSA  
10 can do a lot of things. If Cox went and bought  
11 some NSA equipment, it could do a lot of things,  
12 all right, so ...

13 Q. Have you seen any evidence that Cox  
14 has --

15 MR. PECAU: Wait a minute. I don't  
16 think -- can you let him answer the question?

17 THE WITNESS: Yeah.

18 So when you say, can control, I  
19 don't know what you mean, all right? So I'm  
20 -- it would be pure speculation. You'd have  
21 to be more specific as to can control incoming  
22 packets.

23 You mean, can Cox go out and come up  
24 with a system to control incoming packets from  
25 anywhere to a customer?



1 BY MR. NERCESSIAN:

2 Q. I am using the word control as you use  
3 it in Paragraph 5 here.

4 A. And the way I meant it in Paragraph 5  
5 is, they can cut the service. That's it.

6 Q. That's all they can do?

7 A. That's what they can -- well, no,  
8 that's what they can do. I did not say that's  
9 all they could do. They could actually put  
10 equipment, potentially, at the front end and do  
11 exactly what is being done in a lot of spook  
12 networks, but there would be a hoot and holler  
13 over that and probably a justified one, all  
14 right? So they don't do that as a matter of  
15 course.

16 Could they do things? They could do a  
17 lot of things, all right? As a matter of course  
18 of acceptable business practice, do they do it?  
19 No. But control, absolutely. Cut them off.

20 MR. PECAU: It's 12:30.

21 MR. NERCESSIAN: I just want to finish  
22 this line of questioning.

23 MR. PECAU: Okay.

24 BY MR. NERCESSIAN:

25 Q. Does Cox have the ability -- strike

1 that.

2 Have you seen any evidence that Cox  
3 has the ability to stop a user of a subscriber's  
4 network from violating Cox's Acceptable Use  
5 Policy before any violation occurs?

6 MR. PECAU: I object to the form of  
7 the question.

8 THE WITNESS: It's a hypothetical. I  
9 mean, does Cox --

10 BY MR. NERCESSIAN:

11 Q. No, it's not. I'm asking if you've  
12 seen any evidence.

13 A. I'm sorry. Are you saying can Cox --

14 MR. PECAU: Are you arguing with the  
15 witness?

16 THE WITNESS: -- can Cox prevent  
17 somebody from doing something not even knowing  
18 -- before it's done?

19 BY MR. NERCESSIAN:

20 Q. That's my question.

21 A. Can Cox prevent somebody from doing  
22 something before it's already done? There was  
23 a movie about that, but I -- I couldn't see how  
24 Cox, without foreknowledge, can prevent an  
25 action.

1 goes beyond well anything I know about, so ...

2 BY MR. NERCESSIAN:

3 Q. Would it be proper, in your opinion,  
4 for an ISP to look into packets of its customers  
5 to determine whether a customer was conducting,  
6 participating in or otherwise facilitating a  
7 pyramid or other illegal soliciting scheme?

8 A. As I had indicated --

9 MR. PECAU: Objection; relevance.

10 Go ahead.

11 THE WITNESS: As I had indicated this  
12 morning, I was opining on internet neutrality  
13 about eight years ago, where I took a very  
14 strong position that, other than network  
15 management functionalities, looking at headers,  
16 that, indeed, the ISPs should not examine the  
17 content or manage the traffic accordingly. So  
18 the current internet neutrality position taken  
19 by the FCC is relatively compliant with some of  
20 the papers that we had written in an earlier  
21 phase.

22 BY MR. NERCESSIAN:

23 Q. Do you still believe those expressed  
24 positions?

25 A. Do I what?

1 MR. PECAU: What?

2 BY MR. NERCESSIAN:

3 Q. Do you still believe those positions  
4 you previously expressed regarding net  
5 neutrality?

6 MR. PECAU: Objection. Outside the  
7 scope of his --

8 THE WITNESS: My position --

9 MR. PECAU: -- testimony, and  
10 overly-broad and vague.

11 THE WITNESS: My position on net  
12 neutrality was fairly simple, and that is that  
13 the ISP should not be selective, based upon the  
14 traffic that's coming in, all right, and sorting  
15 it out to end users, nor do so on the outbound.  
16 I had no opinion. The carrier could charge as  
17 much as it wanted for access use, all right? It  
18 could examine the headers and other elements for  
19 network management purposes, but it could not  
20 become a selector of content, which means the  
21 position stands.

22 BY MR. NERCESSIAN:

23 Q. And according to that position, it  
24 would be improper to block BitTorrent traffic;  
25 is that correct?

1 MR. PECAU: Objection.

2 THE WITNESS: According to that  
3 position, it would be inappropriate to  
4 arbitrarily and capriciously block any traffic  
5 in or out of the network without evidence to the  
6 contrary that the -- something was happening,  
7 okay? I always assumed that, in the event that  
8 illegal activity was going on, that's supra to  
9 the rights of transmission back and forth.

10 BY MR. NERCESSIAN:

11 Q. Would it also be inappropriate to  
12 throttle BitTorrent traffic, in your opinion?

13 MR. PECAU: Objection.

14 THE WITNESS: Again, in -- in  
15 -- consistent with what I wrote in 2008,  
16 which I still stand by, is that all traffic  
17 should be handled equally and fairly, in a  
18 nondiscriminatory manner, and that the IP can  
19 examine headers for traffic management and  
20 network management purposes. But in terms of  
21 discriminating against users, I was strongly  
22 opposed to that.

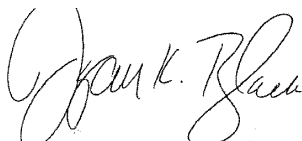
23 BY MR. NERCESSIAN:

24 Q. I want to call your attention,  
25 Mr. McGarty, to --

C E R T I F I C A T E

I do hereby certify that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 10th day of August 2015.

A handwritten signature in cursive script, appearing to read "Ryan K. Black".

Ryan K. Black